

CALL NO.  
CA20N  
XL 11  
-1987  
C72

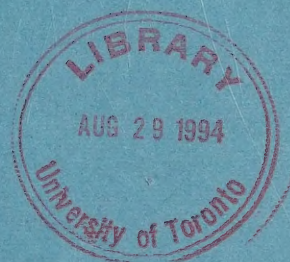
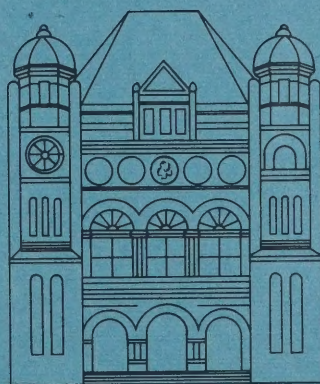
GOVT

Government  
Publications

5

ISSN 0835

CURRENT ISSUE PAPER #72  
OVERRIDING THE CHARTER OF RIGHTS.



**ONTARIO LEGISLATIVE LIBRARY**  
**BIBLIOTHÈQUE DE L'ASSEMBLÉE**  
**LÉGISLATIVE DE L'ONTARIO**



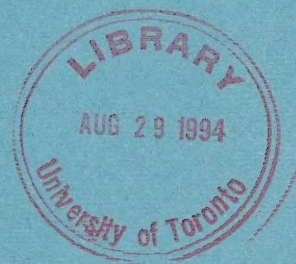
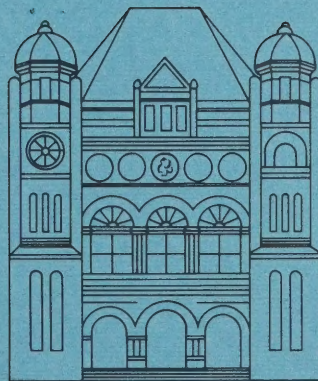
CA20N  
XLII  
- 1987  
C72

(5)

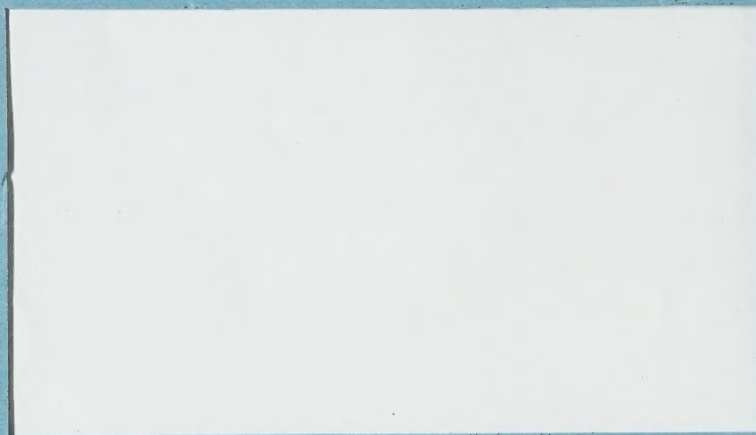
ISSN 0835

CURRENT ISSUE PAPER #72

OVERRIDING THE CHARTER OF RIGHTS



**ONTARIO LEGISLATIVE LIBRARY**  
**BIBLIOTHÈQUE DE L'ASSEMBLÉE**  
**LÉGISLATIVE DE L'ONTARIO**





Legislative Research Service  
Legislative Library  
Service de recherches  
Bibliothèque de l'Assemblée législative

Legislative Building  
Édifice de l'Assemblée législative  
Queen's Park  
Toronto, Ontario  
M7A 1A2

(416) 325-3675  
(416) 325-3637  
Fax (416) 325-3696

ISSN 0835-0299

CURRENT ISSUE PAPER #72

OVERRIDING THE CHARTER OF RIGHTS:  
FEDERAL AND PROVINCIAL POWERS UNDER SECTION 33

Prepared by:

Philip Kaye  
Research Officer  
Legislative Research Service

November 1987



TABLE OF CONTENTS

	<u>Page No.</u>
INTRODUCTION	1
HISTORICAL BACKGROUND	1
OPERATION OF SECTION 33	2
Inherent Limitations	3
Relationship with Section 1 of the Charter	4
Disallowance of Provincial Legislation	5
INVOCATION OF SECTION 33	6
Quebec	6
Saskatchewan	10
EVALUATION OF SECTION 33	12
Case for Section 33	12
Case against Section 33	14
Decentralizing Effects	15
CONCLUSION	16
FOOTNOTES	18
APPENDIX	24



Digitized by the Internet Archive  
in 2022 with funding from  
University of Toronto

<https://archive.org/details/31761115499642>

## INTRODUCTION

Section 33 of the Canadian Charter of Rights and Freedoms<sup>1</sup> has been described as the "dynamite" that finally broke the political logjam between Ottawa and the provinces in November 1981.<sup>2</sup> The section permits the provincial legislatures, as well as the federal Parliament, to "opt-out" of, or "override", many of the Charter's protections. In effect, when passing an act, legislators may preclude the courts from striking it down as contrary to parts of the Charter. In addition, under certain circumstances, they may re-enact a statute found invalid by the courts.

Several issues emerge: What Charter rights can be overridden? How is the override power exercised? Is there any kind of "sunset clause" attaching a time limit to the use of section 33?

After addressing these questions and others on the nature of the override power, this paper looks at the instances where section 33 has actually been invoked. Finally, there is a review of the arguments in support of, and in opposition to, the override clause. These arguments reveal widely differing positions. Professor Peter Hogg, for instance, has called the override power "a prudent concession to the democratic political process and the long Anglo-Canadian tradition of parliamentary supremacy."<sup>3</sup> [emphasis added] On the other hand, criminal lawyer Edward Greenspan has labelled its inclusion in the Charter as a "betrayal."<sup>4</sup> Does the section take the "guts" out of the Charter and "set us back about 700 years in our legal history," as has been claimed?<sup>5</sup>

## HISTORICAL BACKGROUND

An override clause (also known as a non-obstante or notwithstanding clause) was not in any of the earlier versions of the Charter. Indeed, in a document explaining a previous version, the Government of Canada stated that the protection of rights "should not be left simply to the goodwill of the majority or the government of the day."<sup>6</sup> It was only in November 1981 that the federal government accepted the override. Hogg writes:

It [section 33] was the crucial element of the November 5, 1981 federal-provincial agreement, securing the consent of those provinces (other than Quebec) that had until then been opposed to the Charter on the ground that it limited the sovereignty of their Legislatures.<sup>7</sup>

In 1981, the concept of an override clause was not new in Canada. The concept was incorporated in the Canadian Bill of Rights, the Saskatchewan Human Rights Code, the Alberta Bill of Rights, and the Quebec Charter of Human Rights and Freedoms.<sup>8</sup> From an international perspective, however, an opting-out provision appeared to be unique. Dale Gibson in The Law of the Charter concluded that:

This compromise between judicial review and legislative supremacy is peculiarly Canadian. It appears to have no counterpart in major human rights guarantees that operate internationally or in other democracies.<sup>9</sup>

#### OPERATION OF SECTION 33

Section 33 reads:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
- (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

(Note: The Charter of Rights is reproduced in its entirety in the Appendix to this paper.)

### Inherent Limitations<sup>10</sup>

Section 33 contains several inherent limitations. First of all, only section 2 and sections 7 to 15 of the Charter can be overridden. These sections include: (1) the fundamental freedoms, such as freedom of religion, freedom of expression, and freedom of association; (2) the legal rights, such as the right to life, liberty and security of the person; and (3) the equality rights. Excluded are the democratic rights, the mobility rights, the language rights, the provision on enforcing rights and freedoms, and the sexual equality clause. Under the resolution that was introduced in the House of Commons following the federal-provincial agreement, the sexual equality clause (section 28) was subject to the override power. However, as a result of vigorous lobbying by women's groups, the reference to section 28 was deleted.

A second restriction on the override power is that its use must be "expressly" stated. It cannot be inferred.

Thirdly, the override declaration must be inserted in a particular statute. It must be a part of the statute which is exempt from, or of which a provision is exempt from, the application of the Charter.

A fourth limitation is that the override declaration must specify which provision of the Charter is to be disregarded. This requirement was explicitly stated in a recent decision of the Quebec Court of Appeal – Alliance des professeurs de Montréal v. Attorney-General of Quebec.<sup>11</sup> (The Alliance decision is discussed on page 7 of this paper.)

Finally, section 33 contains a "sunset clause." All opt-outs will automatically expire at the end of five years, unless they are re-enacted. A re-enacted declaration will also expire at the end of five years. It appears that there is no limit to the number of renewals that may be made.

What is the purpose of the "sunset clause?" As Hogg points out, the objective is not the imposition of a rigid time limit on the use of the opting-out power. Rather, the clause forces a reconsideration of each exercise of the override power at five-year intervals by Parliament or the Legislature in question.<sup>12</sup> Under the Charter of Rights, federal and provincial elections must be held at least once every five years (section 4). Thus, there is the opportunity for a

change of government before any reconsideration takes place. The necessity for a public debate among legislators after five years may deter unnecessary renewals.

The "sunset clause" was added at the end of the federal-provincial conference of November 1981; it removed the "sole hurdle to an accord."<sup>13</sup> Prime Minister Pierre Trudeau had opposed the extension of the override to fundamental freedoms. In what has been termed "a classic example of raw bargaining,"<sup>14</sup> Trudeau was persuaded to accept the override on fundamental freedoms in exchange for the five-year expiry date for an override declaration.

### **Relationship with Section 1 of the Charter**

Assuming that an override clause meets the above requirements of section 33, is it immune to judicial review under the Charter? In other words, are there any circumstances under which the courts can strike down a section 33 declaration?

It has been argued that an override declaration is a "limit prescribed by law" within the meaning of section 1 of the Charter. Accordingly, it must satisfy the criteria laid down in that section. Section 1 states that:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. [emphasis added]

Thus, the courts must decide whether the override declaration is "reasonable" and "demonstrably justified in a free and democratic society." In brief, this argument holds that section 33 is subject to section 1.<sup>15</sup>

The more widely-held view is that legislators, and not judges, have the final say under section 33. This position concedes that section 33 does not expressly state that section 1 can be overridden. However, it is considered implicit in section 33(2) "that once a Charter provision has been overridden by a statute, the Charter provision has no application whatsoever to the statute"<sup>16</sup> and, therefore, there is no necessity to show reasonableness or

demonstrable justification. It is also argued that the framers of section 33 intended to give the last word to Parliament or the Legislature.<sup>17</sup>

In a 1983 judgment, Chief Justice Deschênes of the Quebec Superior Court agreed that section 33 could not be scrutinized under section 1. He ruled that unlike section 1, "section 33 does not provide the courts with any input on the appropriateness of the legislation."<sup>18</sup> Deschênes C.J.S.C. elaborated:

Under s. 1, much has been said of a transfer of powers to the courts and of the danger of government by judges who are not responsible to the electorate. Section 1 in effect gives the courts the power to appreciate the reasonableness of laws as well as their justification and, depending on the circumstances, to quash them.

The same is not the situation under s. 33. Section 33 imposes conditions of form which the Legislature must comply with and that the court will study later on; but, once these conditions are met, the Legislature reassumes its sovereign power in the fields of its competence and the substance of its derogated law will escape the control of the courts.<sup>19</sup> [translation]

The Quebec Court of Appeal did not deal with this issue in depth; it reversed Chief Justice Deschênes on other grounds. Mayrand J.A. of the Court of Appeal did say, however, that:

In exercising such a right [to override], the Parliament of Canada and the provincial Legislature regain, in the areas mentioned, the sovereignty they had prior to the enactment of the Canadian Charter. Their statutes thus escape judicial control: ". . . such statutes are valid, even if they actually affect the rights and freedoms guaranteed to an extent which clearly exceeds what the restrictive clause of s. 1 would consider valid, since it does not apply to them."

At best, the courts can be called upon to verify whether the power to override has been exercised in conformity with the requirements of s. 33.<sup>20</sup> [emphasis added] [translation]

### Disallowance of Provincial Legislation

The Constitution Act, 1867 gives the federal government the power to disallow any provincial statute.<sup>21</sup> Thus, in theory, Ottawa can overturn the provincial exercise of the override power. In effect, it can "neuter" section

33. There is little doubt that disallowance would provoke intense resentment on the part of the provinces.<sup>22</sup>

### INVOCATION OF SECTION 33

As of August 1987, only Quebec and Saskatchewan had passed legislation invoking section 33. The statutes in question are discussed below.

#### Quebec

Less than 10 weeks after the Charter of Rights came into force, the National Assembly of Quebec passed Bill 62, An Act respecting the Constitution Act, 1982.<sup>23</sup> Bill 62 contained an omnibus override provision. The Bill repealed all previous provincial statutes and re-enacted them, adding the following override clause:

This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 . . .

The passage of Bill 62 served as a kind of protest against the imposition of the Charter on Quebec without its consent. In April 1982, Premier René Lévesque had been quoted as saying:

We're going to make it as complicated, legitimately, and as difficult as we can for some aspects of that bloody Charter to be applied to Quebec.<sup>24</sup>

When Bill 62 was in committee, Marc-André Bédard, the Quebec Minister of Justice had testified that:

. . . the National Assembly will never accept the fact that its powers or rights can be affected without its consent . . . it is in this sense that we explain Bill 62 as a total rejection of this posture of constitutional aggression at the federal level concerning rights and powers of the National Assembly.<sup>25</sup> [translation]

The legislation was soon challenged in the courts in Alliance des professeurs de Montréal v. Attorney-General of Quebec.<sup>26</sup> The Act was upheld by the Quebec Superior Court in April 1983. However, in June 1985 the Court of Appeal reversed the lower Court's decision and declared the legislation invalid. Leave to appeal to the Supreme Court of Canada was granted in September 1985. As of September 1987, no date for a hearing had been set.

In striking down the legislation, the Quebec Court of Appeal ruled that an override declaration must state specifically which provision of the Charter is being overridden. The Court elaborated:

Section 33 provides that the overriding provision can be an Act or a provision of an Act, whereas the text overridden can only be a particular provision of the [Charter] sections mentioned. The declaration of override must therefore be specifically aimed at a given provision or at several given provisions of the sections mentioned; it must not simply consist of a reference to the numbers of those sections being overridden.

\* \* \*

The fundamental freedoms and legal guarantees which may be disregarded by a statute by virtue of s. 33 are so important that they should be expressly stated so as to bring into sharp focus the effect of the overriding provisions and the rights deprived.<sup>27</sup> [emphasis added] [translation]

The Court stressed that one of the characteristics of a free and democratic society is the free expression of opinion. The judgment continued:

The absolute exercise of the override power given by s. 33 is incompatible with the right to freedom of expression . . .

Citizens can only exercise their right to discuss legislative and government action freely if the necessary information has been clearly provided.<sup>28</sup> [translation]

The Court added that "complete information" was required because the invocation of section 33 deprived the citizen of "constitutional legal recourse." Only "political recourse" was left.<sup>29</sup>

There is another case before the courts where the effect of Bill 62 is in issue. In December 1986 in Attorney-General of Quebec v. La Chaussure Brown's Inc.,<sup>30</sup> the Quebec Court of Appeal ruled that certain sections of the Charter of the French Language (Bill 101)<sup>31</sup> were inoperative. The Court held that these sections violated the guarantee of freedom of expression in section 2(b) of the Charter of Rights. One of the provisions in question required the exclusive use of French on public signs and in commercial advertising.

In April 1987, Quebec obtained leave to appeal this decision to the Supreme Court of Canada. A hearing has been scheduled for November 1987.

What role does Bill 62 play in this case? As a result of Bill 62, the legislation in question – the Charter of the French Language – contained the override clause cited earlier:

This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 . . .

The same override clause appeared in a 1983 Act amending the French Language Charter.<sup>32</sup> In a factum filed with the Supreme Court of Canada, Quebec is arguing that these override clauses are valid and in accordance with section 33. Thus, it is argued that the guarantee of freedom of expression in the Charter of Rights has effectively been overridden.<sup>33</sup>

It should be noted that after the passage of Bill 62, the exercise of the override power became a matter of routine in Quebec. Indeed, every statute enacted after June 23, 1982, by the National Assembly while the Parti Québécois (PQ) was in power contained an opt-out clause. When the Liberals came to power in December 1985, the practice stopped. Premier Robert Bourassa explained:

We don't want two classes of citizens in Canada, and Quebecers to be less protected than other Canadians.<sup>34</sup>

Bourassa's comments were echoed by the Quebec Minister of Intergovernmental Affairs who stated that "we have absolutely nothing against the Charter of Rights in Quebec."<sup>35</sup>

The government's acceptance of the Charter was greeted with a PQ-sponsored motion of no confidence. The motion condemned the Liberal government for its "premature, imprudent and improvised recognition" of the Charter. This "recognition" had taken place without "prior public debate" and "without the matter even being brought before the National Assembly." The motion was defeated by a vote of 90 to 22.<sup>36</sup>

Although the routine exercise of the override power has ceased, the power is still invoked on occasion. As of September 1987, the Liberal government had inserted nine override clauses in eight acts. Unlike the earlier clauses, six of the clauses overrode equality rights only. The other three clauses overrode freedom of conscience and religion as well. They did so, as follows:

This Act, so far as it grants rights and privileges to a religious confession, shall operate notwithstanding the provisions of paragraph (a) of section 2 [freedom of conscience or religion] and section 15 [equality rights] of the Constitution Act, 1982 . . .<sup>37</sup>

[Note: Quebec legislation provides for Catholic and Protestant "confessional educational institutions."]

The use of the above override clause was justified to members of the National Assembly by Claude Ryan, the Minister of Education. Ryan explained that section 93 of the Constitution Act, 1867 gave the provinces the right to make laws in relation to education, provided that they did not prejudicially affect the rights of Catholics and Protestants that existed at the time of Confederation. As a result of the Charter of Rights, these rights that were recognized by section 93 would continue to be recognized. Ryan then told the Assembly:

However, there are other clauses and rights established since 1867 that recognize the Catholic and Protestant communities and that may be in question by virtue of section 2 of the Canadian Charter, which establishes freedom of religion for everyone – not only Catholics and Protestants, but everyone – and by virtue of section 15 of the Canadian Charter, which stipulates that everyone must be treated equally and that there must be no distinction based on age, sex, religion or other ground.<sup>38</sup> [translation]

The current Minister of Justice for Quebec, Herbert Marx, has labelled section 33 the "weak link" in the Charter. He has said that "I would do away with the 'notwithstanding clause' in order to put our Charter on a firm basis."<sup>39</sup> (Marx made these comments in an interview in 1985 when he was the Liberal Opposition Justice Critic.)

### Saskatchewan

In January 1986, Saskatchewan became the second province to invoke section 33. The SGEU Dispute Settlement Act ended rotating strikes by 12,000 members of the Saskatchewan Government Employees' Union (SGEU) and imposed a contract agreement. The override clause read:

Pursuant to subsection 33(1) of the Canadian Charter of Rights and Freedoms, this Act is declared to operate notwithstanding the freedom of association in paragraph 2(d) of the Canadian Charter of Rights and Freedoms.<sup>40</sup>

This exercise of the override power was justified in the preamble to the Act. The preamble listed the following factors, among others:

1. The strike was causing hardship and posed a risk of harm to all Saskatchewan residents.
2. It was desirable and in the public interest to bring an end to the strike.
3. Section 33 of the Charter of Rights existed "for the purpose of permitting publicly accountable legislators to finally determine essential economic and social policy."<sup>41</sup>
4. The law was unclear as to the meaning of certain provisions of the Charter of Rights and The Saskatchewan Human Rights Code [i.e., provisions on freedom of association].

With respect to the fourth factor, the Saskatchewan Court of Appeal in the Dairy Workers<sup>42</sup> case had ruled that the Charter's guarantee of freedom of association in paragraph 2(d) included the right to strike. Thus, legislation which prohibited dairy employees from striking violated paragraph 2(d), unless

it could be justified under section 1 of the Charter. (As noted earlier, section 1 allows for reasonable limits on rights and freedoms.) The legislation in question was not saved under section 1.

Saskatchewan Justice Minister Sidney Dutchak cited the Court of Appeal judgment in support of the decision to invoke section 33. He contended that, without the override clause, the courts would have declared the SGEU Dispute Settlement Act invalid.<sup>43</sup> Dutchak wished to emphasize that section 33 was being used "in a careful, limited, and responsible fashion."<sup>44</sup>

The SGEU responded with a court challenge of the province's use of the override. The Union, however, decided not to proceed with the action after the Supreme Court of Canada rendered its decision in the Dairy Workers case.<sup>45</sup> The Supreme Court held that the Charter's guarantee of freedom of association did not include a guarantee of the right to strike.

On a national level, opposition to the Saskatchewan legislation came from such groups as the Canadian Labour Congress, the Canadian Civil Liberties Association, and the Women's Legal Education and Action Fund. One objection held that an override clause should not be inserted in an act until the constitutionality of the act had been tested in the courts. Alan Borovoy, general counsel to the Civil Liberties Association, claimed that:

The hearings in court can affect the political climate. That's the way the system was intended to operate... It increases the political flak they [a government] have to take for invoking the override section.<sup>46</sup>

In an article entitled "Invoking s. 33 override violates spirit of Charter," Cameron McCannell, a lawyer with the Saskatchewan Legal Aid Commission, referred to the government's option of relying on section 1 of the Charter. He also expressed concern over the "lack of public reaction." McCannell wrote:

It is patent that, if indeed the situation was so inconvenient as to impose a danger on the public, the law in Saskatchewan is that the government could have legislated the workers back simply by invoking s. 1 in defence of their position.

It is my view that the government had not been entirely truthful about its reasons for invoking s. 33 and lack of public reaction within Saskatchewan to the suspension of our rights of freedom of association is alarming. What real meaning does the Charter of Rights and Freedoms have if it can be suspended to public apathy for unpopular causes or people?<sup>47</sup>

## EVALUATION OF SECTION 33

### Case for Section 33

Section 33 has been justified on the following grounds, among others:

- It preserves the principle of parliamentary sovereignty;
- Legislators, unlike judges, are electorally accountable. This accountability can work in two ways: (1) the initial enactment of an override declaration will be followed by an election within five years; and (2) if there is the stated intention to re-enact the declaration, the planned re-enactment will be preceded by an election;
- The requirement of an "express" declaration draws the attention of the opposition, the media, and the general public to the use of the override clause. Thus, it will not be politically easy to override the Charter;
- It is difficult to reverse judicial decisions on Charter issues. If the only solution "where the judiciary has miscarried" is a constitutional amendment, then "a tiny minority could hold the nation in a constitutional vise . . ."<sup>48</sup> (Under the Constitution Act, 1982, the four smallest provinces can block certain amendments.)

When he introduced the constitutional resolution of November 1981, the federal Minister of Justice, the Honourable Jean Chrétien, described the override clause as a "safety valve to correct absurd situations without going through the difficulty of obtaining constitutional amendments . . .";<sup>49</sup>

- The notwithstanding clause encourages judicial activism. Judges need not be inhibited in applying the Charter, since they know that legislatures can rely on section 33 if a judicial interpretation is just too unacceptable. This effect was recognized in a judgment of Justice Stuart Cameron of the Saskatchewan Court of Appeal, who said that:

... they [the rights and freedoms of the Charter] may be interpreted generously, resolving ambiguities in their favour, with a view to giving them full recognition and effect – and without excessive concern for where this liberal construction may lead in the light of the power of the legislative branch to limit their exercise under s. 1, or, for that matter, to temporarily suspend them for up to five years under s. 33. These powers, often referred to in the literature of the Charter as the "double-override," afford the legislative branch extensive authority to restrict the exercise of the rights and freedoms in issue, a fact which I think has a place in determining the scope of those rights and freedoms.<sup>50</sup>

Another justification for section 33 holds that democracy is better served when political debates are continued in the legislative arena, rather than the courts. Underlying this position is the assumption that the courts may be out of touch with "the will of the people."<sup>51</sup>

In a recent article, two law professors, Andrew Petter and Allan Hutchinson, wrote that the need to preserve section 33 was "shared by all those in society who look to government as a means for advancing social justice."<sup>52</sup> They noted that the Charter was being used as a weapon to attack certain aspects of the collective bargaining system, such as compulsory dues check-offs. As well, the Charter rights to freedom of the press and to a fair trial were being raised to invalidate some sexual assault provisions in the Criminal Code. Unless court decisions were reversed, the only avenue left would be section 33.

In their article, Petter and Hutchinson made reference to the political judgment of the Saskatchewan government in invoking section 33. They distinguished between an attack on that judgment and the suggestion that the use of the override power was illegitimate or should be subject to judicial restraint. They concluded:

Legislatures ought not override the Charter with reckless abandon, but neither should they feel timid or apologetic in doing so.<sup>53</sup>

In another article, they discussed Ontario's legislation to ban extra-billing by doctors. They recommended that the Ontario government should insert a notwithstanding clause to keep the extra-billing dispute away from the courts. Such an action would "serve to reassure the disadvantaged that government will not permit the Charter to be used to sabotage movements towards social justice."<sup>54</sup>

### Case against Section 33

The principal argument against section 33 is that it leaves the protection of certain rights and freedoms in the hands of the government of the day. As pointed out by the Government of Canada in a pre-November 1981 (i.e. pre-section 33) pamphlet on the Charter:

... we are all aware of instances, within the last 50 years, where some Canadians have been deprived of their rights on the grounds of racial origin or their religious or political beliefs.

... legislative majorities should not have complete freedom to act, inadvertently or deliberately, against the rights of an individual or a minority. If they do so, it is appropriate for aggrieved individuals to seek redress through the courts.<sup>55</sup>

This position against section 33 rests on the assumption that rights are inalienable. Criminal lawyer Edward Greenspan has said:

We have taken a step forward by creating the Charter of Rights, and two steps backward by creating the opting out provision . . . The whole object of a charter is to say, you never opt out, they're inalienable rights. If you believe in liberty, if you believe in rights, the rights are not alienable.<sup>56</sup>

Other arguments against section 33 include:

- A Charter without section 33 would provide a sense of security to individuals and minorities who feel aggrieved;
- The absence of an override clause would remind governments that their powers are limited and must be exercised with respect for the inherent rights of the people;<sup>57</sup>

- The rights and freedoms that can be overridden are so significant as to raise questions about the nature of the freedom that remains. Constitutional lawyer Morris Manning has asked:

If our freedom of conscience or religion can be taken away by a law which operates notwithstanding the Charter, if our right to life or liberty can be taken not in accordance with the principles of fundamental justice, what freedom do we have?<sup>58</sup>

- The mere presence of the override clause can tempt governments to use it. Without section 33, the Saskatchewan government might have relied on section 1 of the Charter when passing the SGEU Dispute Settlement Act.

The "tempting" nature of section 33 and the availability of section 1 were highlighted in a resolution passed by the Canadian Bar Association at its 1984 annual meeting in Winnipeg. The resolution stated that the "'non-obstante' provision invites legislation"; however, "legislative authority is amply protected by Section 1 of the Charter."<sup>59</sup> (The Bar Association recommended that a constitutional conference be convened with a view to repealing section 33. The Association continued that if the section was not repealed, then the use of the override power should be subject to guidelines.);<sup>60</sup>

- The override clause may be used when civil rights need the most protection. In 1985, when he was the Liberal Opposition Justice Critic in Quebec, Herbert Marx (now the Province's Justice Minister) told an interviewer that "the danger of having a "notwithstanding clause" will become evident when we need protection most – we will not have it."<sup>61</sup> As an example of this danger, Marx cited the October Crisis of 1970 when the Canadian government set aside the Canadian Bill of Rights (which had a notwithstanding clause) by passing the Public Order (Temporary Measures) Act.

### Decentralizing Effects

The Charter of Rights acts as a centralizing force "in a subtle sense."<sup>62</sup> First of all, as Peter Hogg notes, it supplies a set of uniform national

standards. These standards for the protection of civil liberties apply throughout the country, and in areas of formerly exclusive provincial jurisdiction.<sup>63</sup> Secondly, the Charter gives persons whose civil liberties have been violated by provincial or federal action the right to appeal to national norms. Hogg writes that these norms "will be enforced by the court system, and ultimately by a national court, the Supreme Court of Canada."<sup>64</sup>

Section 33 counters the centralizing effect of the Charter. It gives provincial legislatures a final say on sections 2 and 7 to 15 of the Charter; it thus permits a regional variation in policies concerning these rights and freedoms.

Depending on one's views of federalism, the decentralizing effects of section 33 are desirable or alarming. On the one hand, reasonable democratic provinces, like reasonable individuals, ought to be allowed to disagree and go their own ways. On the other hand, there is the possibility of a "checkerboard quilt" of human rights throughout Canada. At any one time, some rights might be in force in one province, but not in another.<sup>65</sup>

## CONCLUSION

The inclusion of section 33 in the Charter of Rights was, and remains, an issue of controversy. Political scientist Peter Russell describes the section as the "quintessential Canadian compromise . . . legislative review of judicial review."<sup>66</sup> It is a compromise that is welcomed by some and rejected by others.

During recent federal-provincial discussions on constitutional reform, the role of section 33 has not been an issue of priority. That role, however, may assume more importance as a result of the Meech Lake Accord. The Accord raises two issues that are raised by section 33: (1) the overriding of the Charter of Rights; and (2) the decentralization of power in Canada. Indeed, it was former Prime Minister Pierre Trudeau who explicitly acknowledged the connection between the Accord and section 33 when he said that Prime Minister Brian Mulroney should have told the provinces:

Okay, let's discuss it [bringing Quebec into the Constitution]. You want some more powers, you want to be recognized as a distinct society? Well, maybe I'll think of that.

But how about giving me, the federal government, the right to legislate over national securities . . . or let's take the notwithstanding clause out of the Charter.<sup>67</sup>  
[emphasis added]

Whether or not the notwithstanding clause should be taken out of the Charter, it is one of the Charter's most significant clauses and the public and legislators should be aware of its presence. The Meech Lake Accord may very well heighten that awareness.

## FOOTNOTES

<sup>1</sup>Canada Act, 1982 (U.K.), 1982, c. 11, Schedule B, Part I.

<sup>2</sup>Dale Gibson, The Law of the Charter: General Principles (Toronto: Carswell, 1986), p. 124.

<sup>3</sup>Peter W. Hogg, Constitutional Law of Canada, 2d ed. (Toronto: Carswell, 1985), p. 657.

<sup>4</sup>"'We feel betrayed' on Charter: Greenspan," National, February 1982, p. 26.

<sup>5</sup>This claim was made by Robert McKercher, a former president of the Canadian Bar Association. See "Rights set back 700 years, lawyer says," Globe and Mail, 30 August 1984.

<sup>6</sup>Government of Canada, The Canadian Constitution, 1980: Explanation of a proposed Resolution respecting the Constitution of Canada, 1980, pp. 6-7.

<sup>7</sup>Hogg, p. 692.

<sup>8</sup>Canadian Bill of Rights, R.S.C. 1970, Appendix III, s. 2; Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 44; Alberta Bill of Rights, R.S.A. 1980, c. A-16, s. 2; and Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, s. 52.

<sup>9</sup>Gibson, p. 125. The uniqueness of the override power was reflected in the comments of one Texan criminal lawyer that "it [section 33] blows my mind!" Jack B. Zimmerman at 68th Annual Canadian Bar Association Meeting, Edmonton, 21 August 1986.

<sup>10</sup>This section is derived largely from Hogg, pp. 691-692 and Gibson, pp. 127-128.

<sup>11</sup>(1986), 21 D.L.R. (4th) 354.

<sup>12</sup>Hogg, p. 692.

<sup>13</sup>Roy Romanow, John Whyte, and Howard Leeson, Canada... Notwithstanding: The Making of the Constitution 1976-1982 (Toronto: Carswell/Methuen, 1984), p. 211.

<sup>14</sup>*Ibid.*

<sup>15</sup>See Brian Slattery, "Canadian Charter of Rights and Freedoms - Override Clauses under Section 33 - Whether Subject to Judicial Review under Section 1," Canadian Bar Review 61:1 (March 1983): 391-397; and Daniel J. Arbes, "Limitations on Legislative Override under the Canadian Charter of Rights and Freedoms: A Matter of Balancing Values," Osgoode Hall Law Journal 21:1 (March 1983): 113-141.

<sup>16</sup>Hogg, p. 691.

<sup>17</sup>*Ibid.*, pp. 691-692; Gibson, p. 131.

<sup>18</sup>Alliance des professeurs de Montréal et al. v. Attorney General of Quebec et al. (1983), 5 D.L.R. (4th) 157 at 162.

<sup>19</sup>*Ibid.*

<sup>20</sup>(1986), 21 D.L.R. (4th) 354 at 356. Mayrand J.A. quoted from André Morel, "La Clause limitative de l'article 1 de la Charte canadienne des droits et libertés: une assurance contre le gouvernement des juges," Canadian Bar Review 61:1 (March 1983): 90.

<sup>21</sup>U.K., 30-31 Vict., c. 3, s. 90.

<sup>22</sup>Hogg, p. 90. Hogg opposes the disallowance of provincial statutes. He writes that if the federal objection to a provincial statute is that it is ultra vires or inconsistent with a federal law, then the province may fairly insist that a court determine the issue. If the federal objection is that the statute is unwise, the province may fairly reply that its voters should determine the wisdom of the government's policies. (p. 90)

There is some support, however, for the use of the disallowance power. In "Rights and Judges in a Democracy: A New Canadian Version," University of Michigan Journal of Law Reform 18:1 (Fall 1984): 86, Paul Weiler suggests that:

While it would raise local hackles, Ottawa should be prepared to scrutinize the use by provincial legislatures of their non obstante authority and to disallow any instances of flagrant denial of basic human rights to "discrete and insular minorities" within their boundaries.

In "Entrenchment by Executive Action: A Partial Solution to 'Legislative Override'," Supreme Court Law Review 4 (1982): 317, Stephen Scott proposes that the Letters Patent constituting the office of Governor General be amended. One amendment would require the Governor General to disallow any provincial Act containing an override clause, where the Act had received Royal Assent. Scott would deny Lieutenant-Governors the authority to assent to bills containing override clauses. (p. 316).

The need to control the binding effect of an opt-out clause has also been raised by Senator Jerry Grafstein, but in the context of Senate reform. Grafstein recommends that the Senate be given the "power to override federal or provincial legislation that violates the Constitution if the relevant government invokes the Charter's 'notwithstanding' clause to opt out of the Supreme Court's ruling." See "Stronger Senate would safeguard balance of power," Globe and Mail, 14 May 1987.

<sup>23</sup>S.Q. 1982, c. 21.

<sup>24</sup>"Quebec fighting charter," Winnipeg Free Press, 20 April 1982.

<sup>25</sup>Québec, Assemblée nationale, Commission permanente de la justice, journal des Débats, 32e législature, 3e session (8 juin 1982): B-6231. Bédard also maintained that the Quebec Charter of Human Rights and Freedoms provided better protection than the federal Charter. (p. B-6235)

<sup>26</sup>(1983), 5 D.L.R. (4th) 157, reversed (1986), 21 D.L.R. (4th) 354.

<sup>27</sup>(1986), 21 D.L.R. (4th) 354 at 361.

<sup>28</sup>*Ibid.*, p. 364.

<sup>29</sup>*Ibid.*, p. 365. The Court of Appeal judgment is analyzed in "The Charter and s. 33: Holding Politicians Accountable," Administrative Law Journal 3:2 (Summer 1987): 21-25.

<sup>30</sup>(1987), 36 D.L.R. (4th) 374.

<sup>31</sup>R.S.Q. (looseleaf), c. C-11.

<sup>32</sup>An Act to amend the Charter of the French Language, S.Q. 1983, c. 56, s. 52.

<sup>33</sup>Le Procureur général du Québec v. La Chaussure Brown's Inc., "Mémoire du Procureur général du Québec - Appelant" (devant la Cour suprême du Canada), p. 3.

<sup>34</sup>"Liberals won't exempt laws from Canadian Charter," Montreal Gazette, 7 March 1986. The new policy was formalized in a Cabinet decree of March 5, 1986.

<sup>35</sup>"Quebec ends exemptions from Charter," Globe and Mail, 7 March 1986. (Gil Rémillard is quoted.)

<sup>36</sup>Québec, National Assembly, Votes and Proceedings, 33rd Legislature, 1st Session (25 March 1986): 150-151.

<sup>37</sup>This clause was inserted in the Act respecting the Conseil supérieur de l'éducation, R.S.Q. (looseleaf), c. C-60, the Education Act, R.S.Q. (looseleaf), c. I-14, and the Act respecting the Ministère de l'Éducation, R.S.Q. (looseleaf), c. M-15, by S.Q. 1986, c. 101, ss. 10-12.

The other five Acts with override clauses are: the Act respecting the Pension Plan of Certain Teachers, S.Q. 1986, c. 44; the Act respecting the Government and Public Employees Retirement Plan, R.S.Q. (looseleaf), c. R-10; the Act respecting the Teachers Pension Plan, R.S.Q. (looseleaf), c. R-11; the Act respecting the Civil Service Superannuation Plan, R.S.Q. (looseleaf), c. R-12; and the Act to promote the development of agricultural operations, R.S.Q. (looseleaf), c. M-36. The override clauses were inserted by S.Q. 1986, c. 44, ss. 62, 87, 97 and 105; S.Q. 1986, c. 54, s. 16; and S.Q. 1987, c. 47, s. 157.

<sup>38</sup>Québec, Assemblée nationale, journal des Débats, 33e législature, 1re session (13 novembre 1986): 5027.

<sup>39</sup>Marvin Hershorn, "An interview with Herbert Marx," Viewpoints 13:8 (Winter 1985): 1.

<sup>40</sup>S.S. 1984-85-86, c. 111, s. 9(1).

<sup>41</sup>*Ibid.*, preamble.

<sup>42</sup>Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 et al. v. Government of Saskatchewan et al., [1985] 5 W.W.R. 97, reversed [1987] S.C.C. No. 8 (QL Systems SCC Database); 87 CLLC 12, 201.

<sup>43</sup>"Saskatchewan determined to override Rights Charter," Globe and Mail, 13 February 1986.

<sup>44</sup>Saskatchewan, Legislative Assembly, Hansard: Debates and Proceedings, 20th Legislature, 4th Session (31 January 1986): 4342.

<sup>45</sup>Telephone interview with Ralph Ermel, Chief Executive Officer, Saskatchewan Government Employees Union, Regina, 13 October 1987.

<sup>46</sup>"Saskatchewan is first to declare single law exempt from Charter," Globe and Mail, 12 February 1986.

<sup>47</sup>"Invoking s. 33 override violates spirit of Charter," Lawyers Weekly, 5 September 1986.

<sup>48</sup>Weiler, above n. 22, p. 83. Not only are judicial decisions difficult to reverse by means of a constitutional amendment, they have no guaranteed review. Section 33(3), however, requires legislators to review the operation of an override clause, if they wish it to be in force for more than five years. See Michael D. Bayles, "The 'Notwithstanding' Clause: A Defense," Westminster Institute Review 2:2 (Winter 1983): 17.

<sup>49</sup>Canada, Parliament, House of Commons, Hansard: Official Report of Debates, 32nd Parliament, 1st Session (20 November 1981): 13043.

<sup>50</sup>Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 et al. v. Government of Saskatchewan et al., [1985] 5 W.W.R. 97 at 131. The Court of Appeal decision was reversed by the Supreme Court of Canada. See n. 42.

<sup>51</sup>It has been argued that the United States Supreme Court was out of touch with "the will of the people" during the so-called *Lochner* era (1905-1937). The "due process" clause of the Constitution was interpreted so as to invalidate economic and social welfare legislation, such as legislation limiting work hours. See Mr. Justice W.S. Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights," Queen's Law Journal 8:1-2 (Fall 1982/Spring 1983): 228-229; and Andrew Petter, "Charter loophole imperils basic right," Globe and Mail, 20 February 1986.

The issue of "rigid decisions" by the United States Supreme Court and the need for a safety-valve in the event of similar decisions by the Canadian courts was raised by a former Attorney-General for Ontario. See R. Roy McMurtry, "The Search for a Constitutional Accord - A Personal Memoir," Queen's Law Journal 8:1-2 (Fall 1982/Spring 1983): 64-65.

- <sup>52</sup>"Hitting home hard with Section 33," Toronto Star, 3 May 1986.
- <sup>53</sup>*Ibid.*
- <sup>54</sup>Allan Hutchinson and Andrew Petter, "Charter's core values don't belong to property owners," Canadian Lawyer 10:6 (September 1986): 42.
- <sup>55</sup>Government of Canada, The Canadian Constitution, 1980, pp. 12-13.
- <sup>56</sup>"We feel betrayed on Charter: Greenspan," National (February 1982): 26.
- <sup>57</sup>Government of Canada, The Canadian Constitution, 1980, p. 12.
- <sup>58</sup>Morris Manning, Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982 (Toronto: Emond-Montgomery, 1983), p. 55.
- <sup>59</sup>"Annual Meeting – Resolutions," National (September 1984): 27 (Resolution 84-01-A).
- <sup>60</sup>*Ibid.*
- <sup>61</sup>Hershorn, p. 8.
- <sup>62</sup>Hogg, p. 652.
- <sup>63</sup>*Ibid.*
- <sup>64</sup>*Ibid.*
- <sup>65</sup>The decentralizing effects of section 33 are discussed in detail in Roger Gibbins, Rainer Knopff, and F.L. Morton, "Canadian Federalism, The Charter of Rights, and the 1984 Election," Journal of Federalism 15 (Summer 1985): 166-169. See also Edward McWhinney, Canada and the Constitution 1979-1982: Patriation and the Charter of Rights (Toronto: University of Toronto Press, 1982), p. 97.
- <sup>66</sup>Peter H. Russell, "The effect of a Charter of Rights on the policy-making role of Canadian courts," Canadian Public Administration 25:1 (Spring 1982): 32.
- <sup>67</sup>"Trudeau to premiers: Think again," Toronto Star, 30 May 1987. When he appeared before the Special Joint Committee of the Senate and the House of Commons on the Meech Lake Accord, Trudeau proposed the repeal of section 33. He asked: "Would you not concede, for example, that it is desirable to have the notwithstanding clause removed from the Canadian Charter?" Earlier, he had testified: "You think the notwithstanding clause is hard to put up with. What effort did the present government make to do away with it?" Canada, Parliament, Special Joint Committee of the Senate and of the House of Commons on the 1987 Constitutional Accord, Proceedings (27 August 1987): 140-141.

In its Report, the Joint Committee acknowledged that section 33 "was a controversial measure at the time it was put into the Constitution in 1982. It should be looked at again." Canada, Parliament, Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord, Report (Ottawa: [The Committee], 1987), p. 145.

In an Addendum to the Report, the Liberal members of the Committee proposed that section 33 should be repealed (p. 150). In another Addendum, the New Democratic Party members wrote that the First Ministers should discuss the possible repeal of the section (p. 157).



APPENDIX

Canadian Charter of Rights and Freedoms  
(Constitution Act, 1982, Part I)



# CONSTITUTION ACT, 1982

as enacted by the Canada Act 1982 (U.K.) c. 11, proclaimed in force April 17, 1982, and amended by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984

## PART I

### CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

#### *Guarantee of Rights and Freedoms*

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Rights and freedoms in Canada

#### *Fundamental Freedoms*

2. Everyone has the following fundamental freedoms:
- (a) freedom of conscience and religion ;
  - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication ;
  - (c) freedom of peaceful assembly ; and
  - (d) freedom of association.

Fundamental freedoms

#### *Democratic Rights*

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Democratic rights of citizens

4.—(1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Maximum duration of legislative bodies

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Continuation in special circumstances

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Annual sitting of legislative bodies

#### *Mobility Rights*

6.—(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Mobility of citizens

Rights to move and gain livelihood	(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right <ul style="list-style-type: none"> <li>(a) to move to and take up residence in any province ; and</li> <li>(b) to pursue the gaining of a livelihood in any province.</li> </ul>
Limitation	(3) The rights specified in subsection (2) are subject to <ul style="list-style-type: none"> <li>(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence ; and</li> <li>(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.</li> </ul>
Affirmative action programs	(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

*Legal Rights*

Life, liberty and security of person	7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
Search or seizure	8. Everyone has the right to be secure against unreasonable search or seizure.
Detention or imprisonment	9. Everyone has the right not to be arbitrarily detained or imprisoned.
Arrest or detention	10. Everyone has the right on arrest or detention <ul style="list-style-type: none"> <li>(a) to be informed promptly of the reasons therefor ;</li> <li>(b) to retain and instruct counsel without delay and to be informed of that right ; and</li> <li>(c) to have the validity of the detention determined by way of <i>habeas corpus</i> and to be released if the detention is not lawful.</li> </ul>
Proceedings in criminal and penal matters	11. Any person charged with an offence has the right <ul style="list-style-type: none"> <li>(a) to be informed without unreasonable delay of the specific offence ;</li> <li>(b) to be tried within a reasonable time ;</li> <li>(c) not to be compelled to be a witness in proceedings against that person in respect of the offence ;</li> <li>(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal ;</li> </ul>

## CONSTITUTION ACT, 1982

1—3

- (e) not to be denied reasonable bail without just cause ;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment ;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations ;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again ; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment. Treatment or punishment

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence. Self-crimination

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter. Interpreter

*Equality Rights*

15.—(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Equality before and under law and equal protection and benefit of law

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Affirmative action programs

*Official Languages of Canada*

16.—(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada. Official languages of Canada

Official languages of New Brunswick	(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.
Advancement of status and use	(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.
Proceedings of Parliament	17.—(1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.
Proceedings of New Brunswick legislature	(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.
Parliamentary statutes and records	18.—(1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.
New Brunswick statutes and records	(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.
Proceedings in courts established by Parliament	19.—(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.
Proceedings in New Brunswick courts	(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.
Communications by public with federal institutions	20.—(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where <ul style="list-style-type: none"> <li>(a) there is a significant demand for communications with and services from that office in such language ; or</li> <li>(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.</li> </ul>
Communications by public with New Brunswick institutions	(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.
Continuation of existing constitutional provisions	21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.
Rights and privileges preserved	22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

## CONSTITUTION ACT, 1982

1—5

*Minority Language Educational Rights*

## 23.—(1) Citizens of Canada

Language of instruction

- (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
- (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Continuity of language instruction

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

Application where numbers warrant

- (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
- (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

*Enforcement*

24.—(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Enforcement of guaranteed rights and freedoms

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Exclusion of evidence bringing administration of justice into disrepute

*General*

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

Aboriginal rights and freedoms not affected by Charter

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. [Amended, Constitution Amendment Proclamation, 1983.]

Other rights and freedoms not affected by Charter	26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.
Multicultural heritage	27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
Rights guaranteed equally to both sexes	28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
Rights respecting certain schools preserved	29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.
Application to territories and territorial authorities	30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.
Legislative powers not extended	31. Nothing in this Charter extends the legislative powers of any body or authority.

*Application of Charter*

Application of Charter	32.—(1) This Charter applies <ul style="list-style-type: none"> <li>(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and</li> <li>(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.</li> </ul>
Exception	(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.
Exception where express declaration	33.—(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
Operation of exception	(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
Five year limitation	(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
Re-enactment	(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
Five year limitation	(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

CONSTITUTION ACT, 1982

1—7

*Citation*

34. This Part may be cited as the *Canadian Charter of Rights and* Citation  
*Freedoms*.











3 1761 11549964 2